Marchese Metal Industries, Inc. *and* Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO. Case 29–CA–14299

April 15, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On September 21, 1990, Administrative Law Judge Eleanor MacDonald issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified to conform the notice to the Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Marchese Metal Industries, Inc., Holbrook, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to recognize and bargain with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO, as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All production and maintenance employees, including plant clericals, employees of Respondent engaged in the fabrication and/or manufacture of all ferrous and non-ferrous metals, iron, steel, and other metal products, including plastic product, and all maintenance employees of Respondent engaged in maintaining machinery and equipment and other maintenance work in or about Respondent's shop or shops, and work performed by such production and maintenance employees, but not including office clerical employees, superintendents, or employees represented by any other union affiliated with the AFL–CIO with whom Respondent has signed a collective bargaining agreement, or to erection, installation, or construction work, or to employees engaged in such work.

WE WILL NOT fail and refuse to sign the collective-bargaining agreement we agreed to with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL sign the collective-bargaining agreement we agreed on with the Union with an effective date of October 8, 1987.

WE WILL give retroactive effect to the collective-bargaining agreement and make you whole for any losses you may have suffered as a result of our failure to sign the agreement.

MARCHESE METAL INDUSTRIES, INC.

Jonathan Leiner, Esq., for the General Counsel.
Martin H. Scher, Esq. and *Suzanne Youssef, Esq. (Law Offices of Martin H. Scher)*, of Carle Place, New York, for the Respondent.
Vicki Erenstein, Esq. (Sipser, Weinstock, Harper & Dorn), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Brooklyn and New York, New York, on May 1 and 2, 1990. The complaint alleges that Respondent, in violation of Section 8(a)(1) and (5) of the Act, refused to sign a collective-bargaining agreement reached by Respondent and the Union. Respondent denies that it reached agreement with the Union, and it alleges that it remains willing to negotiate with the Union and that the instant proceeding is time barred.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent in July 1990, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, with its principal office in Holbrook, New York, is engaged in the manufacture of iron and steel staircases and related products. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent and the Union have been parties to a collective-bargaining agreement with a term from October 8, 1984, to October 7, 1987.

The unit represented by the Union is:

> All production and maintenance employees, including plant clericals, employees of Respondent engaged in the fabrication and/or manufacture of all ferrous and nonferrous metals, iron, steel, and other metal products, including plastic products, and all maintenance employees of Respondent engaged in maintaining machinery and equipment and other maintenance work in or about Respondent's shop or shops, and work performed by such production and maintenance employees, but not including office clerical employees, superintendents, or employees represented by any other union affiliated with the AFL–CIO with whom Respondent has signed a collective bargaining agreement, or to erection, installation, or construction work, or to employees engaged in such work.

On July 1, 1987, the Union sent Respondent a notice to terminate the expiring contract and a demand to negotiate a successor agreement. On August 31 and again on September 21, 1987, Dennis Marchese, president of Respondent, informed the Union that he wished to meet for the purpose of negotiating a new contract. Marchese and William Colavito, the president of Local 455, agreed to meet on October 2, 1987, to commence negotiations.

There is also in existence an industry contract between the Union and an employer association but Respondent is not a party to that contract. However, both Marchese and Colavito were aware of its provisions and of the fact that when they commenced negotiations in 1987 the industry contract was soon to be renegotiated.

The charge in this proceeding was filed by the Union on August 23, 1989, and served on Respondent on August 28, 1989.

B. *Credibility of the Witnesses*

Marchese and Colavito were the only two witnesses in this proceeding. They testified about the negotiations out of which this controversy arises.

Colavito testified in a forthright manner and was cooperative and not evasive on cross-examination. His recollection was good and his demeanor was impressive. I shall credit his testimony.

Much of Marchese's testimony on direct examination was given in response to leading questions. Many of these questions dealt with facts that go to the heart of the instant controversy. Time and again these leading questions supplied to Marchese the substance of his testimony and lead him into areas that he did not recall. I formed the impression that Marchese was not able to testify about Respondent's factual contentions without the aid of leading questions and I concluded that Marchese did not actually remember from his own recollection the version of the facts that Respondent would have me find. Further, in many significant instances Marchese contradicted the sworn affidavit he had given to a Board agent in this proceeding and an affidavit he had given in a New York State Supreme Court proceeding. These inconsistencies further convinced me that Marchese did not recall the matters concerning which he was testifying before me.

I have decided not to credit Marchese's recollection of the negotiations at issue and I have decided to rely on the testimony of Colavito in finding the relevant facts.

C. *The Negotiations*

1. Testimony of Colavito

Colavito testified that he and Marchese met on October 2, 1987, at the Respondent's premises. Marchese's father and the shop steward were also present. Colavito presented Marchese with a proposed contract for the period October 8, 1987, to October 7, 1990. The proposal continued the union-security provision and a hiring hall provision of the old contract. There was a no-strike no-lockout provision with an exception in cases where Respondent did not honor the award of an arbitrator or failed to make fund contributions.[1] The proposed agreement continued the 30-day probationary period for new employees and the seniority language contained in the expiring contract. It made no reference to seniority of replacement employees during the vacation period. The proposal had a schedule of vacation benefits based on length of service in the industry. The no-subletting clause of the old contract was retained.

The wage proposal called for an 8-percent general wage increase on three successive anniversary dates of the contract. It set forth minimum hourly rates for employees in certain classifications; the minimum rates were to be increased 8 percent on each anniversary date. The Union's proposal contained an increased welfare fund contribution amounting to 14 percent of payroll effective in 1987 and the industry rate effective July 1, 1988. The Union also proposed a 1-percent apprenticeship training/upgrading trust fund contribution and an increase in the annuity fund contribution from 20.21 percent to 25 percent. The Union demanded a severance pay trust fund contribution. Finally, the Union's proposal for ''Trust Fund Protection'' provided that the Union could request arbitration of the Company's failure to make trust fund contributions and that the employees could strike on 10 days' notice in the event the Company failed to make its contributions. The previous contract had contained similar language but provided 30 days' notice of an intention to strike.

[1] This proposal continued the language of the old contract and corrected a typographical error in the expiring contract.

Colavito testified that the Company proposed on October 2 to delete the hiring hall provision of the contract. The Union objected and no agreement was reached on this subject. Similarly, the Union rejected the Employer's proposal to increase the probationary period to 60 days. In this case, the Company withdrew its proposal and agreed that the contract would continue a 30-day probationary period. Respondent also proposed deleting the no subletting of work clause of the collective-bargaining agreement; the Union refused and no agreement was reached. The Employer wished to establish a low rate of pay for inexperienced helpers. Colavito said he had no objection to the concept; he said there would have to be agreement on the starting rate and a progression leading up to the experienced helpers rate.

During the October 2 meeting, Colavito gave Marchese a copy of the Union's proposed contract. Marchese said he would look it over and a second meeting was scheduled for October 6.

The same group of negotiators met on October 6. During this meeting Marchese expressed his opposition to the apprenticeship trust fund and no agreement was reached on that subject. Marchese and Colavito discussed the issue of severance pay; Marchese said he would like to deal with that subject in future contracts and no agreement was reached on this subject. The parties discussed the annuity fund and Respondent's lack of a pension fund and no agreement was reached to raise the annuity fund. Marchese contended that other employers paid less to the welfare fund than did Respondent, a contention that Colavito disputed. The parties agreed that the welfare fund contribution would remain at 10.9 percent for the first 6 months of the contract and that thereafter Respondent would pay 14 percent as did the rest of the industry. Beginning July 1, 1988, the employer would pay whatever the new industry rate might be but not more than 16 percent. By July 1990, the Company would pay a contribution equal to the then existing industry rate.

The Company proposed wage increases of 75, 50, and 50 cents. After some discussion, the parties agreed to a wage increase of $1 per hour the first year, and 75 cents in the second and third years. Marchese proposed a $7.25 minimum rate for inexperienced helpers. The parties eventually agreed to an $8 starting rate for inexperienced helpers with a 19-month progression to the experienced rate.

Marchese and Colavito discussed the fact that some employees of the Company were earning less than the minimum rates proposed by the Union. They eventually agreed that those employees would receive a 20-cent-per-hour increase every 6 months until they reached the minimum rate of pay. The parties also agreed that new hires could be paid at the lowest rate then existing in a job classification and that they would be subject to the 20-cent progression.

In response to the Union's demand for a vacation trust fund, Marchese proposed a vacation schedule based on industry seniority on a phased in basis. Colavito dropped his request for a trust fund and he agreed on a vacation schedule which he and Marchese wrote out at that time to cover 1987 through 1990.

During this meeting, Marchese withdrew his proposal to delete the no-subletting clause. Marchese asked Colavito for a vacation replacement clause such as existed in the industry contract. This provision permits the employer to hire vacation replacements while his employees are away. According to Colavito, the replacements do not gain seniority unless they are retained after the regular employees return to work. Colavito agreed that the new contract would contain the industry vacation replacement clause.

Finally, according to Colavito, the parties agreed to a 3-year contract term.

Colavito testified that during this meeting there was no discussion of the right of Marchese's family to work in the shop, nor concerning overtime, nor overtime work during a partial layoff, and no discussion was had about an absolute prohibition on strikes.

At the conclusion of the meeting of October 6, 1987, Colavito told Marchese that a number of agreements had been reached and that ''[i]f we agreed that these were the agreements that should be incorporated in the old contract then we have an agreement if the men ratify it.'' Marchese and Colavito agreed that the latter would meet with the men in the shop and ask them to ratify the 3-year agreement. Colavito then went into the shop and reported on the agreements he had reached with Marchese. After some discussion, the men ratified the agreements by a secret-ballot vote. Colavito went back to see Marchese and his father. He told them, ''we have an agreement for the next three years.'' According to Colavito, Marchese and his father were relieved and said ''fine.'' Then Colavito promised to send them a written document showing the new contract.

At the end of January 1988, Colavito gave Marchese a typed agreement. He told him to look it over and sign it if there were no problems, but to call Colavito if there were problems. Colavito testified that in the typing of the new agreement the Union made certain errors. It left out the 20-cent progression for workers paid at less than the minimum contract rate. The draft omitted the agreement that new hires could be paid at the lowest rate then being paid in their classification. The agreement erroneously specified that the industry welfare fund rate shall apply on July 1, 1989, instead of July 1, 1990, as agreed to by the parties. Further, the draft did not recite the 2-percent cap on welfare fund increases that Colavito had accepted.

Colavito testified that he did not change provisions of the expired contract unless he and Marchese had agreed to make specific changes for the new contract term. Thus, the draft did not include any of the Union's demands that Colavito had agreed to drop. However, through inadvertence, the draft did not continue the 30-day strike notice for delinquent trust fund contributions and instead it specified a 10-day notice. Colavito testified that this was a mistake.

Between January and May 1988, Colavito spoke to Marchese from four to six times, each time asking Marchese if he had had a chance to look at the new contract and trying to get a response to the draft. Marchese repeatedly told Colavito that he was very busy and that when he could get to it he would call Colavito. At the end of May 1988, Marchese called Colavito and said he had found some problems with the draft which he wished to discuss.

Marchese and Colavito met on June 1, 1988. Marchese asked to remove a word from the no-strike no-lockout clause. The old agreement had provided in section 33(C) that the Union could strike on 30 days' notice if the Company failed to make fund contributions. Section 11(A) of the expired agreement had provided that the Union agreed not to ''cause, permit, or take part in any strike, picketing, sit-down, stand-

in, intentional slow-down or curtailment or restriction of production or interference with work in or about the Company's plant(s) or premises, or the failure on the part of the Company to carry out the award of the arbitrator or where herein otherwise specifically provided, in Relation to Fund Contributions.''[2] In the proposal submitted by Colavito on October 2, 1987, and the draft contract given to Marchese on June 1, 1988, one word and one letter were added to the language so that it provided that the Union would not permit any job action ''in or about the Company's plant(s) or premises except for the failure on the part of the Company to carry out the award of the arbitrator.'' Marchese wanted to take out the word ''except'' which had been added by Colavito. Colavito said it did not make any sense to remove the word and the two men argued about the matter until Colavito said he would look into it and get back to Marchese. Marchese pointed out that under the old agreement he had been entitled to 30 days' notice of a strike for failure to make payments to a fund and that it should be continued in the new contract since the parties had not agreed to a change. Colavito agreed to make the correction.

Marchese said that Colavito had erroneously provided that the contribution to annuity funds was based on weekly payroll instead of straight time hourly earnings, and Colavito agreed that the draft was wrong and should be changed. Colavito agreed, when Marchese pointed out the errors, to correct the welfare fund language so that it provided parity with the industry in 1990 and specified a 2-percent cap on contributions. In addition, Colavito agreed that the assistant foreman wage provision from the old contract should have been placed into the new contract and the 20-cent progression for those earning below the minimum rates should have been incorporated into the contract. Colavito testified that Marchese then tried to renegotiate the rates for inexperienced helpers but that when he insisted that the parties adhere to the agreement reached in October 1987, Marchese backed off. Colavito also rebuffed an attempt by Marchese to renegotiate the vacation clause agreed to in October.

Colavito testified that he then raised with Marchese the Company's failure to implement the 20-cent wage progression that was to have taken place in April 1988. Marchese promised to take care of it right away, and the employees reported to Colavito that the increase was paid retroactively soon after.

At the end of this meeting, Colavito told Marchese that he would make the corrections they had discussed and send him the corrected pages. Marchese agreed to this procedure. According to Colavito, after he and Marchese had gone over all the points raised by the latter, Colavito said, ''This is it'' and Marchese said, ''This is it.'' Colavito said, ''I will redraft those pages and get them back to you.'' Marchese replied, ''Fine, if everything is in conformity, we will have an agreement and I will sign it for you.''

Colavito testified that Marchese did not raise any problem relating to the hiring hall at this meeting.

In July 1988, Colavito delivered the corrected pages to Marchese. He had removed the word ''except'' from section 11(A) as requested by Marchese. He had included the assistant foreman provision inadvertently left out of the earlier draft. The Union had added the provision for new employees to be paid at the lowest rate then paid in the classification and the 20-cent progression for those earning under the minimum rate. The corrected pages showed July 1, 1990, as the effective date for welfare fund parity with the industry contract as well as the 2-percent cap on increase in contributions for July 1, 1988. Colavito had made a change to show that the annuity fund contribution would be based on straight time hours of pay and he corrected the language relating to the 30-day strike notice for failure to make fund contributions.[3]

From September 1988 until sometime in the spring of 1989, Colavito called and visited Marchese at the plant to ask about the contract. Each time Marchese pleaded the press of business and asked Colavito to bear with him. According to Colavito, Marchese did not tell him that he was refusing to sign the contract and Marchese raised no problems with the language submitted by Colavito.

In May or June 1989, Colavito received a telephone call from Attorney Scher on behalf of Respondent. Scher said that he wanted to set up a meeting to complete negotiations. Colavito replied that the negotiations had been completed in October 1987, and that the contract had been ratified. Scher said, ''That was news to him'' and promised to get back to Colavito. In the middle of May 1989, Colavito was in the shop and asked to see Marchese; the secretary said Colavito should make an appointment. In June, Colavito telephoned Marchese three times and was told that Marchese would return his calls; Marchese did not return the calls.

At some point, Scher contacted the Union's attorney and a meeting was arranged to discuss the negotiations. Colavito attended the meeting on July 17, 1989. Marchese and Scher were there; Colavito was accompanied by Attorney Harper and an International representative. Scher stated that negotiations were not complete and that he had a long list of items raised during the October negotiations which had to be discussed. Scher mentioned the right of Marchese's family to work in the shop. Colavito said that had never been raised previously and that the Union would not discuss it. Scher said the Company wanted the right to discipline for the refusal of overtime and he wanted to change the provision relating to notice for overtime work. Again, Colavito said these matters had never been raised before and that he would not discuss them. Scher said the Company wanted to delete the subletting clause. Colavito replied that the parties had agreed to retain the language of the expired contract and that the Union would not discuss the matter any further. Scher stated that he wanted the vacation clause to be based only on Company seniority and not mention industry seniority. Colavito said the matter had already been negotiated in October 1987. Scher demanded that the right to strike be absolutely deleted from the contract. Colavito refused to change the old contract language. Scher stated that the most the Company would agree to on welfare fund contributions was 14 percent. When Colavito informed him of the agreement reached on welfare, Scher repeated that the most the Company would agree to was 14 percent. Scher also said the Company wanted to delete the hiring hall provision. Colavito also refused to discuss

[2] This sentence does not parse and is obviously the product of some typographical error.

[3] Although Colavito corrected the draft to show that 30 days' notice was to be provided, he did not correct a later sentence in the paragraph which refers to the notice as a 10-day notice. However, the intent of the paragraph is clear that the Union must give 30 days' notice.

this issue on the ground that the parties had agreed in October 1987 to retain the hiring hall language of the expired contract.

Another meeting was held on August 10, 1989, and Scher again brought up the list of items he had raised at the last meeting. Colavito steadfastly refused to renegotiate the contract, maintaining that the parties had a contract already. When Scher mentioned the issue of Marchese's family working in the shop, Colavito said that the Union would agree to preserve the past practice in the shop. However, Scher said he wanted the family members to have superseniority over the other employees in the shop. The meeting ended and Colavito has had no further communication with either Marchese or Scher concerning the collective-bargaining negotiations.

At the end of June 1989, Respondent's employees went on strike. Colavito told them that he was having trouble getting Marchese to sit down with him and discuss pending grievances and sign the agreement.

On cross-examination by counsel for Respondent, Colavito denied that he had an unalterable practice of executing a stipulation of settlement whenever he settles a contract. Colavito said that sometimes he does not have any writing prior to ratification. When he met with the employees of Respondent for the ratification vote, he had some notes with him and he had the vacation schedule prepared by Marchese. He was able to brief the employees from his memory.

On cross-examination, Colavito explained that he and Marchese had agreed to a schedule of minimum rates for classifications of work. On the effective date of the new contract, employees would not automatically be raised to the minimum rate; they would receive a $1-per-hour increase and every 6 months they would receive 20 cents per hour increments until they reached the minimum rate.

Colavito testified that during the negotiations, the parties agreed that if they did not agree on a specific change to the expiring contract then the old provisions would be continued. Each side raised certain issues which were not agreed to by the other side; in such cases, there was no change to the existing contract language. The issues on which there was no agreement for a change were dropped in the interest of achieving a new collective-bargaining agreement.

According to Colavito, during all the months he was pressing Marchese to execute the new contract, Marchese never once responded that he was not signing because he believed that there remained open issues to be resolved. The first time the Union was told that Respondent alleged that the negotiations were not complete was when Colavito met with counsel for Respondent in July 1989.

2. Testimony of Marchese

Marchese testified that he met with Colavito only once in October, on October 6 or the 7. He stated that he was anxious to begin negotiating as the old agreement was about to expire. Neither his father nor the shop steward were present at the negotiations. At one point during the meeting, according to Marchese, agreement was reached on the wage increase and the vacation schedule and Colavito said he had enough to keep the men going and that he would see if they agreed to the wage increase and vacation schedule. Then he and Marchese could get together again. Marchese stated that during the course of the meeting he had seven or eight proposals and Colavito had about the same number. The two men also went through the expiring agreement and stated their positions on the various articles. Only Colavito took notes during the negotiations.[4] Marchese testified that he discussed a purported typographical error in the right to strike clause and told Colavito that he wanted to retain the language. Marchese proposed a 60-day probationary period but he and Colavito did not resolve that issue. Marchese wanted to hire a vacation replacement who would not accrue seniority, but he and Colavito did not reach agreement on that. Respondent proposed that it be permitted to sublet work, but the Union refused and no agreement was reached on that proposal. Marchese recalled a discussion of minimum rates for inexperienced shop helpers but he did not recall discussing minimum rates for other employees.[5] Marchese testified that he agreed to an increase in the welfare fund contribution to 14 percent of the weekly payroll 6 months after the effective date of the contract. But he did not agree to a tie in to the industry contract nor had Colavito proposed such a tie in.[6] According to Marchese, there was no discussion about the apprentice fund. Marchese refused to increase the contribution to the annuity fund and no agreement was reached on that matter.[7] He also told Colavito that he wanted the contract to prohibit strikes for any reason but no agreement was reached on that matter. Finally, Colavito accepted his proposal to pay inexperienced employees $8 per hour to start, but there was no agreement on any progression.

According to Marchese Colavito went to speak to the men. When he returned, he told Marchese that the men agreed to the wages and the vacation schedule and that he would get back to Marchese. He assured Marchese that the men would continue working and he would contact Marchese at a later date. Marchese testified that there was no handshake to signify a conclusion to the negotiations.

Marchese testified that in March 1988, Colavito dropped off at the shop a draft agreement. Marchese stated that the document was full of errors and that there were items that were never discussed. For example, the Union wanted the right to strike ''for whatever reason they deemed fit.''[8] Marchese believed that although he agreed to a wage increase of $1, 75, and 75 cents, the provision of minimum rates would provide larger initial increases than those figures.

Between March and June 1988 Marchese told Colavito that he had problems with the document. The two men met in June 1988, and Marchese showed Colavito the drafting errors and mentioned the items left open after the October meeting. Marchese testified that Colavito said he would get back to him on the issues Marchese had raised.

---

[4] On cross-examination and in his sworn affidavit given to a Board agent, Marchese stated that he took notes at this meeting and worked from those notes.

[5] On cross-examination, Marchese recalled that there was a discussion of employees earning below the minimum rate and that two 20-cent increases were agreed on. Marchese could not recall who made the proposal.

[6] On cross-examination, Marchese admitted that his sworn affidavit stated that Colavito proposed that Respondent would meet the new industry standard for welfare fund contributions as of July 1, 1990, and before that a 2-percent cap would apply to increases in the 14-percent contribution beginning July 1, 1988.

[7] On cross-examination, Marchese testified that agreement was in fact reached on the annuity fund contribution; the annuity remained at 20.21 percent.

[8] This is manifestly incorrect and contradicts Marchese's own testimony at other portions of the transcript.

After June 1988, according to Marchese, Colavito dropped off some pages of the contract at the plant. Marchese objected to the language of these pages, testifying that they did not reflect the agreements made by the parties. Among the problems, according to Marchese, was that Colavito changed the strike notice to 30 days in one portion of the trust fund protection clause but left a 10-day notice at the bottom of the paragraph. Marchese insisted he wanted a 30-day strike notice.[9]

Marchese testified that Colavito asked him to sign the contract two or three times after the June 1988 meeting and that he told Colavito that he did not agree to the contract and would not sign it. Marchese testified that in May 1989, Colavito again asked him to sign the contract.[10] He could not recall in what manner any of these requests took place, by telephone or in person or by letter. After that, Marchese referred Colavito to his attorney. The men went out on strike on June 27, 1989.

Marchese testified that in mid-July 1989, he met with the Union in Attorney Scher's office. Marchese's version of the discussion on this occasion contradicts that given by Colavito. A second similar meeting was held in August 1989. The items in dispute were discussed but no agreement was reached.[11]

Discussion and Conclusions

Respondent's arguments are based, in the main, on the version of facts as testified to by Marchese. I have not credited this testimony and I need not deal with those arguments. Further, Respondent seems to object to Colavito's methods of negotiating and, in particular, it takes exception to Colavito's failure to have Marchese initial or sign a memorandum setting forth the points agreed to at each meeting. I note that there is no requirement that parties to negotiations follow this or any other procedure. Colavito testified that he does not follow an invariable procedure with respect to initialling and preparing memoranda. In fact, Marchese did not testify that he suggested to Colavito that they initial any agreed on points or draw up any memorandum. Respondent further argues that the General Counsel had an obligation to corroborate Colavito's testimony; there is no such requirement.

As explained above, I credit the testimony of Colavito and I do not credit nor do I rely on the testimony of Marchese. Thus, I find, in accordance with the testimony of Colavito, that he met with Marchese on October 2 and 6, 1987, and that a 3-year collective-bargaining agreement between Respondent and the Union for a term from October 8, 1987, to October 7, 1990, was negotiated on those dates and was ratified by the unit employees on October 6. I find that the provisions of the expiring contract were retained except as they were modified by the agreement of Marchese and Colavito. I find that in January 1988, Colavito delivered to Marchese a copy of the new contract for signature and that, as a result of Marchese's complaint that the draft contained errors and omissions, he and Colavito met on May 1, 1988, to go over the errors. I find that Marchese and Colavito agreed on corrections to the draft and that Marchese said that if the corrections were made ''we will have an agreement and I will sign it for you.'' Marchese also agreed to implement, and did implement, a 20-cent wage progression due under the new contract in April 1988. I find that Colavito made the corrections he and Marchese had discussed and that he delivered the corrected pages to Marchese in July 1988.

The contract prepared by Colavito and given to Marchese in January 1988, together with the pages of corrections agreed on by the two men on June 1 and delivered to Marchese in July 1988, constitutes the contract between Respondent and the Union. I have credited Colavito's testimony that Marchese told him that if he made all the corrections asked for by Marchese on June 1, 1988, ''we will have an agreement and I will sign it for you.'' I have found above that Colavito did indeed make all the corrections agreed to and I therefore conclude that Respondent violated Section 8(a)(5) and (1) of the Act when it refused to sign the contract. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 523–526 (1941); *Roslyn Garden's Tenants Corp.*, 294 NLRB 506 (1989). Respondent's subsequent attempts to gain more concessions from the Union amounted to an attempt to renegotiate the contract and the Union was not obligated to make any changes in the agreement.

As found above, Colavito repeatedly requested that Marchese sign the contract but Marchese, pleading the press of business, asked Colavito to bear with him. Marchese did not tell Colavito that he had any problems with the corrections made by Colavito. In May or June 1989, Colavito had his first indication that Respondent alleged that no collective-bargaining agreement had been concluded with the Union when Attorney Scher telephoned him with a request to negotiate further. However, Scher did not purport to be fully informed as to Respondent's position and promised to contact Colavito later. Colavito continued to press Marchese for an appointment and a meeting was held on July 17, 1989, where Respondent raised new issues and sought new agreements from the Union. The Union maintained that the parties had long ago settled their contract and refused to reopen the negotiations. A similar meeting was held on August 10, 1989. At these meetings, the parties engaged in discussion which could serve to clarify the meaning of the contract language they had agreed to; for instance, Colavito said the Union would not hold that the contract changed the past practice whereby family members had worked in the shop.[12] I find that the first occasion on which the Union could have been certain that the Respondent was in earnest in seeking to reopen negotiations and would not sign the contract was at the meeting of July 17, 1989. The charge filed and served, respectively, on August 23 and 28, 1989, is thus well within the 6-month period provided by the Act. Even if the Union were found to have received notice that Respondent was re-

[9] Marchese did not explain how this accorded with his earlier contention that he wanted to eliminate the right to strike for any reason and that there was no agreement reached on the right to strike. Marchese's affidavit also states that he wanted to preserve the strike and lockout provision from the expiring contract.

[10] In Marchese's affidavit given in a related proceeding in New York State Supreme Court, Suffolk County, he stated that between July 1988 and May 1989, Colavito asked him personally and on the telephone about six to eight times to sign the contract.

[11] Marchese's affidavit states that Respondent proposed ''that the notice to the employees of overtime be changed from lunchtime to whenever the employer discovered the need for such overtime, and the union representative agreed to this.''

[12] These discussions to clarify the meaning of the contract do not amount to further negotiations. *Granite State Distributors, Inc.*, 266 NLRB 457–458 (1983).

fusing to execute the collective-bargaining agreement when Attorney Scher called Colavito in May or June 1989, the August charge would have been timely. The instant proceeding is therefore not time barred.

CONCLUSIONS OF LAW

1. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, including plant clericals, employees of Respondent engaged in the fabrication and/or manufacture of all ferrous and non-ferrous metals, iron, steel, and other metal products, including plastic products, and all maintenance employees of Respondent engaged in maintaining machinery and equipment and other maintenance work in or about Respondent's shop or shops, and work performed by such production and maintenance employees, but not including office clerical employees, superintendents, or employees represented by any other union affiliated with the AFL–CIO with whom Respondent has signed a collective bargaining agreement, or to erection, installation, or construction work, or to employees engaged in such work.

2. At all times material, the Union has been the exclusive representative of all employees within the appropriate unit described above for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

3. By refusing to sign the collective-bargaining agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent shall be ordered to execute the collective-bargaining agreement agreed on with the Union and to comply with its terms retroactively. In addition, Respondent must make whole the employees in the bargaining unit and the Union for losses, if any, which they may have suffered by the Respondent's refusal to sign the agreement in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1983). Respondent must make payments to employee benefit funds as required by the collective-bargaining agreement and reimburse the employees for any costs they may have incurred in the manner provided in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Marchese Metal Industries, Inc., Holbrook, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO, as the exclusive bargaining representative of all its employees in the appropriate unit set forth above concerning rates of pay, hours, or any other terms or conditions of employment.

(b) Refusing to sign the collective-bargaining agreement agreed on by Respondent and the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Forthwith execute the collective-bargaining agreement with the Union with an effective date of October 8, 1987.

(b) Give retroactive effect to the provisions of the agreement and make whole the employees in the manner set forth in the remedy section of the decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Holbrook, New York, copies of the attached notice marked ''Appendix.''[14] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''